

Message Text

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ACTION EB-11

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DEP PASS TREASURY FOR BRADFIELD

E.O. 11652: N/A

TAGS: EGEN UNCTAD

SUBJ: CHARTER OF ECONOMIC RIGHTS AND DUTIES OF STATES

REF: GENEVA 5598

1. DRAFTING COMMITTEE HAS CONTINUED TO WORK OVER
BRILLANTES FORMULA. CHAPEAU AND PARA 2(A), AS
NEWLY NUMBERED, REMAIN AS REPORTED REFTEL. DEBATE ON
PARA 2(B) INDICATES THAT GROUP OF 77 IS UNWILLING TO
ACCEPT PROVISION THAT "EACH STATE HAS THE RIGHT TO
FREELY ENTER INTO UNDERTAKINGS RELATING TO THE IMPORT
OF FOREIGN CAPITAL WHICH SHALL BE OBSERVED IN GOOD
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FAITH". WHILE CHADHA (INDIA) AND WALKER (JAMAICA) CLAIM

THAT THEY DO NOT DENY THAT A STATE SHOULD OBSERVE SUCH UNDERTAKINGS, THEY CLAIM IT IS INAPPROPRIATE TO INCLUDE THIS PROVISION ON THE GROUND THAT CHARTER IS CONCERNED WITH RIGHTS AND DUTIES OF STATES TOWARDS ONE ANOTHER AND NOT TOWARDS COMPANIES. WE HAVE POINTED OUT THAT OTHER ELEMENTS OF CHARTER AND OF THIS VERY ARTICLE, SUCH AS THOSE RELATING TO MNCS AND NATIONALIZATION, DEAL WITH STATE RIGHTS VIS-A-VIS COMPANIES. WE HAVE ALSO FIRMLY MAINTAINED THAT, WITHOUT INCLUDING PROVISION OF SUBSTANCE OF 2(B), USG CANNOT AGREE TO THIS ARTICLE; THAT SATISFACTORY PROVISIONS IN 2(B) AND ON JSUT COMPENSATION, AS WELL AS INTERNATIONAL OBLIGATIONS, ARE REQUIRED IF WE ARE TO MAKE THE CONCESSIONS TO THE GROUP OF 77 WHICH PARAS 2(A) AND 2(C) EMBODY.

2. THERE HAS BEEN NO PROGRESS ON PARA 2(D) ON NATIONALIZATION. AS OF EVENING SEPT 5, CHADHA MAINTAINS IT MUST READ: "...TO NATIONALIZE, EXPROPRIATE OR REQUISITION FOREIGN PROPERTY, IN WHICH CASE THE QUESTION OF COMPENSATION SHALL BE DECIDED UPON BY THE NATIONALIZING STATE IN ACCORDANCE WITH DOMESTIC LAW AND IN THE LIGHT OF ALL RELEVANT CIRCUMSTANCES". WE HAVE MADE CLEAR THAT THIS IS OUT OF THE QUESTION. WALKER AND EL ERIAN (EGYPT) HAVE CONSPICUOUSLY FAILED EXPRESSLY TO SUPPORT CHADHA ON THIS TEXT AND, IN HIS ABSENCE, HAVE TOLD GROUP B REPRESENTATIVES THAT THEY RECOGNIZE THAT IT IS UNREASONABLE. IN THE END, CHADHA, WALKER AND EL ERIAN AGREED TO REOPEN WITH GROUP OF 77 WHAT IT CAN ACCEPT ON THIS CLAUSE. WALKER INDICATED THAT HE WAS FAVORABLY DISPOSED TOWARDS "EQUITABLE COMPENSATION SHALL BE PAID IN THE LIGHT OF ALL RELEVANT CIRCUMSTANCES." FREELAND (UK) INDICATED WILLINGNESS TO CONSIDER "EQUITABLE" ONLY IF "IN THE LIGHT OF ALL RELEVANT CIRCUMSTANCES" DELETED. COMMENT: WHILE WE HAVE STUCK TO "JUST", WE WOULD RECOMMEND ACCEPTANCE OF SUBSTITUTION OF "EQUITABLE" PROVIDED THAT "RELEVANT CIRCUMSTANCES" DELETED. INSTRUCTIONS REQUESTED. END COMMENT.

3. ON NEWLY RENUMBERED PARAS. 2(E) AND (F), WE HAVE LIMITED OFFICIAL USE

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RESISTED PRESSUED TO CONDENSE THESE INTO A SINGLE SUBPARA WHICH WOULD NOT SPECIFICALLY ENUMERATE VARIOUS MEANS OF PACIFIC SETTLEMENT. NEBERTHELESS, WE REQUEST AUTHORITY TO ACCEPT IT WE JUDGE IT TACTICALLY USEFUL THE FOLLOWING: "IN CASES WHERE DISPUTES CONCERNING THE TREATMENT OF FOREIGN INVESTMENT OR COMPENSATION THEREFOR ARISE, THE NATIONAL JURISDICTION OF THE STATE TAKING SUCH MEASURES SHALL BE EXHAUSTED UNLESS OTHERWISE AGREED

BY THE PARTIES; WHERE SO AGREED, SETTLEMENT SHALL BE SOUGHT THROUGH OTHER PEACEFUL MEANS ON THE BASIS OF THE SOVEREIGN EQUALITY OF STATES AND IN ACCORDANCE WITH THE PRINCIPLE OF FREE CHOICE OF MEANS."

4. EXTENDED DUELING OVER LAST SENTENCE OF ART. 2

PRODUCED FOUR FORMULATIONS:

(A) "IN RESPECT TO THE FOREGOING RIGHTS, ALL STATES SHALL, AS SPECIFIED IN CHAPTER I OF THIS CHARTER, ACT IN "FULLFILLMENT IN GOOD FAITH OF INTERNATIONAL OBLIGATIONS", AND SHALL EQUALLY OBSERVE THE OTHER PRINCIPLES SET FORTH IN THAT CHAPTER."

(B) "IN RESPECT OF THE FOREGOING RIGHTS, ALL STATES CONCERNED SHALL OBSERVE THE PRINCIPLES SET FORTH IN CHAPTER I OF THIS CHARTER."

(C) IN RESPECT OF THE FOREGOING RIGHTS, EVERY STATE HAS THE DUTY TO FULLFILL IN GOOD FAITH ITS OBLIGATIONS UNDER THE GENERALLY RECOGNIZED PRINCIPLES AND RULES OF INTERNATIONAL LAW."

(D) "IN RESPECT OF THE FOREGOING RIGHTS, ALL STATES SHALL FULLFILL IN GOOD FAITH THEIR INTERNATIONAL OBLIGATIONS, SHALL REFRAIN FROM ANY FORM OF COERCION, AND SHALL OTHERWISE OBSERVE THE PRINCIPLES SET FORTH IN CHAPTER I OF THIS CHARTER."

5. FORMULATION (A), THOUGH DEVELOPED FROM A SUGGESTION OF WALKER (JAMAICA) BY USDEL, WAS REJECTED BY SPOKESMAN OF GROUP OF 77. ACCEPTED BY GROUP B.

6. FORMULATION (B) PROPOSED BY CHADA ON BEHALF OF 77 AND REJECTED BY GROUP B.

7. FORMULATION (C) REMARKABLY BUT ACTUALLY DRAFTED BY EL ERIAN, NATURALLY WAS ACCEPTED BY GROUP B, BUT LIMITED OFFICIAL USE

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WAS REJECTED BY CHADHA AND WALKER AND, AFTER BEING VETTED BY GROUP OF 77, BY IT.

8. FORMULATION (D) WAS DRAFTED BY WALKER, ACCEPTED BY EL ERIAN, AND ACCEPTED WITH A RESERVATION BY CHADHA (WHO INSISTS ON INSERTING "VALID" BEFORE "INTERNATIONAL OBLIGATIONS"). USDEL INITIALLY DECLINED IT, BUT, ON PRIVATE REPRESENTATIONS OF FREELAND AND MONGOMERY (CANADA), AGREED TO JOIN IN PLACING IT BEFORE GROUP B, WITHOUT, HOWEVER, ANY COMMITMENT TO ITS SUPPORT.

9. FREELAND AND MONGOMERY MAINTAIN THAT, IN UNLIKELY EVENT WE CAN SECURE SATISFACTORY PROVISIONS ON REST OF ARTICLE, WE SHOULD ACCEPT FORMULATION (D). THEY POINT OUT THAT THE PROVISION ON COERCION REFERS TO

THE FOREGOING RIGHTS OF NATIONALIZATION, ETC., AND THEY THINK IT IS A GOOD THING TO SAY THAT A STATE MUST REFRAIN FROM COERCION IN THIS REGARD. THEY RECOGNIZE THAT THE TERM COULD ALSO BE TURNED AGAINST WEST, BUT THEY MAINTAIN THAT THIS INTERPRETATION IS NOT NECESSARY NOR EVEN AS PLAUSIBLE AS THE ONE JUST GIVEN. USDEL WOULD APPRECIATE DEPT'S IMMEDIATE REACTIONS AS TO WHETHER THIS TEXT IS TOLERABLE.

10. OTHER ISSUES: THERE HAS BEEN SINGULARLY LITTLE PROGRESS OR EVEN DISCUSSION OF ISSUES OTHER THAN FOREIGN INVESTMENT, IN PART BECAUSE CASTANEDA, THOUGH CHAIRMAN WITH AN AGREED TIMETABLE, HAS NOT PRESSURED DELEGATES TO FOCUS ON OUTSTANDING ISSUES. NON-DISCRIMINATION IN TRADE, LOS, INDEXATION, ETC., HAVE NOT BEEN DISCUSSED AS OF THURSDAY EVENING. THERE WAS BRIEF ARGUMENT ON THURSDAY ON PRODUCERS CARTELS AND COMMODITY AGREEMENTS, WITH AUSTRALIA PROPOSING AND THE EC REP (SALTER) SUPPORTING WITH AN AMENDMENT A TEXT WHICH READS: "ALL STATES HAVE THE RIGHT TO ASSOCIATE IN ORGANIZATIONS IN ORDER TO DEVELOP THEIR NATIONAL ECONOMIES AND TO ACHIEVE STABLE FINANCING FOR THEIR DEVELOPMENT, IN PARTICULAR THAT OF THE DEVELOPING COUNTRIES, WITHIN A FRAMEWORK OF INTERNATIONAL COOPERATION, AND IN ORDER TO PROMOTE THE SUSTAINED GROWTH OF THE WORLD ECONOMY." UDEL RESISTED THIS PROPOSAL, AND CON-

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VERSATIONS WITH EC MEMBERS INDICATE THAT THE EC MAY BACK OFF. WE ALSO DO NOT EXPECT THE GROUP OF 77 TO ACCEPT IT, BUT RATHER TO INSIST THAT IT SPECIFICALLY ENDORSE PRODUCERS' CARTELS.

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